INDEX

	Page
I. Respondents' Interpretations of The Statute Not Supportable	3
II. The Board's New Claims of Further Immunity From Judicial Scrutiny Require Clarification by This Court	8
Conclusion	11

AUTHORITIES CITED

Cases:

Ass'n for the Benefit of Non-Contract Employees v. *National Mediation Board,* 218 F. Supp. 114 (D.D.C. 1963)	4
General Committee, B.L.E. v. *Missouri K-T-R Co.,* 320 U.S. 323 (1943)	9
General Committee, B.L.E. v. *Southern Pac. Co.,* 320 U.S. 338 (1943)	9
Hecht Co. v. *Bowles,* 321 U.S. 321 (1944)	10
Leedom v. *Kyne,* 358 U.S. 184 (1958)	9
Railway Clerks v. *Employees Ass'n,* 380 U.S. 650 (1965)	4, 7
St. Joseph Stock Yards Co. v. *United States,* 298 U.S. 38 (1936)	10
System Federation v. *Virginia Ry. Co.,* 11 F. Supp. 621 (E.D. Va. 1935)	10
Switchmen's Union v. *National Mediation Board,* 77 U.S. App. D.C. 264, 135 F.2d 785 *rev'd on other grounds,* 320 U.S. 297 (1943)	6, 7, 9
Switchmen's Union v. *National Mediation Board,* 320 U.S. 297 (1943)	9, 10
Virginian Ry. Co. v. *System Federation,* 300 U.S. 515 (1937)	4, 6, 7, 10

STATUTE: Page

Railway Labor Act, Section 2, Fourth, 48 Stat. 1187, 45 U.S.C. § 152, Fourth 3, 4, 6

MISCELLANEOUS:

Brief of National Mediation Board and its Members in Opposition 2, 4, 5, 6, 8, 9

Brief of International Brotherhood of Teamsters in Opposition 3

Hearings on H.R. 7650 (and H.R. 9689), House Committee on Interstate and Foreign Commerce, 73rd Cong., 2d Sess. 5

L. Jaffe, Judicial Control of Administrative Action (1965) 10

Hope, *"Majority Choice"—What Does it Mean?* 18 Lab. L.J. (1967) 2

IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

No. 434

AERONAUTICAL RADIO, INC., *Petitioner*

v.

NATIONAL MEDIATION BOARD, ET AL., AND INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA, *Respondents*

REPLY TO OPPOSITIONS TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

The Oppositions filed herein to the Petition for Certiorari are amply demonstrative of why certiorari should be granted.

Neither the Mediation Board nor the Teamsters appear to question the importance of the issues here presented to the administration of the Railway Labor Act. In fact, the Board recognizes the possibility that "industrial strife, with an interruption in the nation's

transportation industry may well result from the continued controversy among the carrier and its employees over the proper representative" (Brief of National Mediation Board, hereafter N.M.B., in Opposition, p. 14).

While noting that the controversy here is more accurately described as one over whether *any* representative should have yet been certified, we agree with the Board that industrial strife in the air transportation industry may inevitably result over this issue, unless the fundamental question of "majority choice" is now answered by this Court. Fortunately, in the instant case, both the respondent union and petitioner have conducted themselves in such a manner that no such strife or disruption has resulted. These circumstances, however, in no way alter the fact that the need for the resolution of this issue is both a critical and continuing one.[1] It cannot be passed off simply as a question of the "manner" in which the Mediation Board fulfills its statutory obligations or one of "methods and procedures." Congress has written a statute which states that the "majority of any craft or class of employees shall have the right to determine who shall be the representative of the craft or class . . ." The question here is not "judging" the manner in which the majority choice has been determined, but rather what is the ultimate meaning and statutory requirement resulting from this language.

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[1] The continuing nature of this controversy and its importance are well illustrated in a recent article. Hope, *"Majority Choice"—What Does It Mean?* 18 Lab. L.J. 515 (1967). The same considerations generated the participation of the Air Transport Association—representing the interests of an industry employing over 205,000 persons and operating under roughly 286 basic collective bargaining agreements—as *amicus curiae* below.

I. RESPONDENTS' INTERPRETATIONS OF THE STATUTE NOT SUPPORTABLE

The Oppositions merely argue the merits of respondents' respective conclusions (significantly arrived at through different processes) that the Board's action was consistent with *their* interpretation of the statute, and at any rate, that the judiciary is precluded from inquiry into Board certifications as long as certain *mechanical* steps have been taken by the Board.

The Teamsters claim that when Section 2, Fourth of the Act uses the word "majority" it "merely defines *the decision-making body.*" (Brief of International Brotherhood of Teamsters, hereafter IBT, in Opposition, p. 3) (emphasis in original). And that when this "decision-making body" has expressed a preference for one or more unions, the decision for unionization has been made, "the statutory requirements are exhausted," and the Board is thereafter free to choose "who" the representative of the class is to be.

Even assuming the validity of this new two-step theory (it has never even been mentioned by the Board), the Teamsters advance neither authority nor logical support for the further assumption, the *sine qua non* of their theory, that the "decision-making body" must be made up of *only the groups who voted for unionization* even though the largest single group voted for "no union." It seems clear that the only basis for this assumption is that the vote of those who prefer "no union" is somehow worth less than the vote of those who prefer "some union," a premise so radical that it fairly cries for clarification by this Court before it is endorsed, even by implication.

By contrast, the Mediation Board carefully declines to commit itself to any particular rationale in order to

support its conclusion in this case.[2] Rather, it merely claims that its procedures represent a "reasonable accommodation of the 'majority rule' principle embodied in Section 2, Fourth, of the Act" (Brief of N.M.B. in Opposition, p. 10). The core of the Board's argument is thus simply a flat denial "that Congress intended that an absolute majority of the employees must affirmatively indicate their support for a particular union before the Board could certify that union as the bargaining representative" (Brief of N.M.B. in Opposition, p. 9)[3] and that accordingly the statutory

[2] It is interesting to note that certifying the choice of the majority of those who want a union, rather than the choice of the majority of the craft or class, has been variously supported by the presumption that those who don't vote have agreed to be bound by the will of the majority of those who do vote, *Virginian Ry. Co.* v. *System Federation,* 300 U.S. 515 (1937), later restricted by *Railway Clerks* v. *Employees Ass'n,* 380 U.S. 560 (1965); by arguing that workers "*just don't have a right to vote for no representation,*" *Ass'n for the Benefit of Non-Contract Employees* v. *National Mediation Board,* 218 F. Supp. 114, 125 (D.D.C. 1963) (emphasis in original); and by orally suggesting to the Court of Appeals in this case that it would not be unreasonable to apply the presumption that those who voted for the Airline Dispatchers Association would prefer the Teamsters to "no union." That the record in this case is still devoid of any indication of just how the Board reached its conclusion from the vote is illustrated by the ambivalent justification proffered by the Court of Appeals.

[3] No one, of course, makes such a claim. For example, the Board would have been perfectly free to presume that non-voters acquiesced in the choice of the majority of those who voted for some union, provided the eligible voters had some other way to indicate their "no union" preference, as would have been the case had the Board chosen to use a ballot with a "no union" box. Under those circumstances no one would reasonably argue that "an absolute majority of the employees must affirmatively" indicate their choice of the union to be certified, for under the principles of the *Virginian Ry. Co.*, the absolute majority could permissibly be made up of a composite of actual votes cast by the "majority of the majority," plus the presumptive votes of the non-voters.

requirements are satisfied by the certification of "the choice of an absolute majority of *those employees favoring representation.*" (Brief of N.M.B. in Opposition, p. 11) (emphasis added).

Both the legislative history and prior decisions of the courts are in conflict with the Board's position.

Thus, at the hearings on the 1934 Amendments to the Act, Congressman Pettengill specifically questioned Commissioner Eastman, the draftsman of the Act, as follows:

> "Mr. Pettengill. The reason I raised the question is that on page 6, line 7, the words are—
>
> The majority of any craft or class of employees shall have the right to determine who shall be the representative of the craft or class for the purpose of this act.
>
> I was wondering if that language would be accurate, because at an election a majority of the total number might not even participate.
>
> Commissioner Eastman. Well, that is a pertinent question. And, with that provision in paragraph 4, *I think the rules would have to provide for a majority of those who are determined to have the right to vote.* (emphasis added).
>
> Mr. Pettengill. And to participate in the election."[4]

The next day, the same question was raised again by Congressman Huddleston—with the same answer given:

> "Mr. Huddleston. There seems to be an ambiguity in the second sentence of this subsection fourth.

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[4] Hearings on H.R. 7650 (and H.R. 9689), House Committee on Interstate and Foreign Commerce, 73rd Cong., 2d Sess., p. 35.

> The majority of any craft or class of employees shall have the right to determine who shall be the representative of the craft or class for the purposes of this act.
>
> And, I am uncertain just what is meant by a majority. Does that mean a majority of all of the employees in the service of that particular employer?
>
> Commissioner Eastman. As it reads, I think it does, Sir."[5]

This colloquy demonstrates that both the draftsman of the 1934 amendments and the Congress[6] were well aware that the word "majority" in Section 2, Fourth, meant the majority of the entire craft or class, not, as now claimed by the Board, just of those who voted for some union.

Indeed, that the statute meant just what it said was confirmed by this Court in the *Virginian Ry Co.* case,[7] just three years later.

The question there was whether a union could be validly certified by the National Mediation Board when the actual ballots it received were less than a majority of the eligible voters. This Court squared the Board's

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[5] *Id.* at 57. The Mediation Board suggests that the citation to this colloquy in our petition was misleading. Brief of N.M.B. in Opposition, fn. 5. We stand on it, and invite the Court's attention to it.

[6] "The 1934 amendments to the Act were originally prepared and explained to the Congressional Committees by their author, Mr. Eastman, then Federal Coordinator of Transportation." *Switchmen's Union* v. *National Mediation Board,* 77 U.S. App. D.C. 264, 274, 135 F. 2d 785, 795 *rev'd on other grounds,* 320 U.S. 297 (1943).

[7] *Virginian Ry. Co.* v. *System Federation,* 300 U.S. 515 (1937).

certification in that case with the plain language of the statute by ruling that those who did not vote could be presumed to have consented to be bound by the vote of those who *did* vote.

The Court expressly recognized that "the words of the section confer the right of determination upon a majority of those eligible to vote . . ." but it permitted the construction of that majority through the combined use of these presumptive votes, together with actual votes, because the statute "is silent as to the manner in which that right [i.e., the right of the "majority of those eligible to vote"] shall be exercised."[8]

Therefore, in *Virginian* this Court in express language recognized that the word "majority" in Section 2, Fourth, meant "majority of those eligible to vote." Most significantly, however, it confirmed this meaning by its action, for if that language had meant what the Board now claims it means (i.e., a majority *of those who vote for a union*), there would have been no need whatever for the Court to articulate *any* presumption. Of course, it has now made it clear that this presumption is not available when the Board uses a ballot which precludes any written vote for "no union." *Railway Clerks* v. *Employees Association,* 380 U.S. 650, 669-70 (1965).

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[8] *Id.* at 560. Thus, the use of the presumption satisfies the intent of the Act ". . . to furnish a procedure whereby the employees of a particular craft or class could attain a representation by the organization which the *majority* of that craft or class desired." *Switchmen's Union* v. *National Mediation Board,* 77 U.S. App. D.C. 264, 275, 135 F. 2d 785, 796, *rev'd on other grounds,* 320 U.S. 297 (1943) (emphasis in original), while at the same time preventing the potential frustration of the designation of a representative by an indifferent or possibly coerced minority who did not cast actual votes.

II. THE BOARD'S NEW CLAIMS OF FURTHER IMMUNITY FROM JUDICIAL SCRUTINY REQUIRE CLARIFICATION BY THIS COURT

The true measure of the need for review by *certiorari* here is best illustrated by the extreme extrapolation of the statutory language which the Board finds necessary to support its position as well as by the Board's extravagant claims of near plenary immunity from judicial scrutiny under conditions heretofore never even contemplated by the courts or the Congress; and by its unqualified demand that the federal judiciary *must* make available the judicial injunctive power to enforce Board decisions, without the power to consider their essential legality.

Thus, the Board *now* insists that:

> "... the carrier's duty is not to bargain with the representative which it or a court might believe to be the true representative of the employees. Rather, the carrier is under a mandatory duty to 'treat with' the representative so certified.' In a situation where the certification cannot be invalidated under the standards of the *Switchmen's Union* and *Railway Clerks* decisions, the carrier *must* bargain with the certified union under the clear language of the statute. The Act leaves no room for a court of equity to exercise discretion and excuse a carrier from refusing to bargain on the ground that the certification was improper under circumstances where the certification itself is immune from judicial invalidation." (Brief of N.M.B. in Opposition, p. 13) (emphasis in original).

There is no question that the Board is claiming that the Railway Labor Acts gives it the right to take action in excess of its delegated powers and immunizes it from judicial review as long as it is not "contrary to a specific

prohibition in the Act,"[9] (Brief of N.M.B. in Opposition, p. 9); that the Act further precludes review as to the manner in which the Board has performed its duty to investigate and choose a representative—as long as it has performed a certain number of mechanical steps, (Brief of N.M.B. in Opposition, p. 9); that it empowers a private litigant (the certified union) to present evidence of that action (the certification) to a court of equity and in turn *compel* the court to issue its most extraordinary remedy in the form of a mandatory injunction *irrespective of the validity of the Board's action under law.*

This unprecedented claim is at once so sweeping and so at odds with the most fundamental precepts of due process and the nature of the judicial power that it defies detailed rebuttal within the practical limits of this reply.

Thus, we can only assert that the petitioner can and will, should *certiorari* be granted, demonstrate that no such power inheres in the Mediation Board; that the limitations of the *Switchmen's Union* and its companion cases[10] by their own terms are not applicable to this case since it involves neither a jurisdictional dispute between two unions nor the vindica-

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[9] The quoted limitation was borrowed from *Leedom* v. *Kyne*, 358 U.S. 184, 188 (1958) where it was applied to the scope of *direct* review of an N.L.R.B. certification, which is subsequently reviewable in related enforcement proceedings—and for that reason a limitation obviously inapposite here, where the agency also claims immunity from review in the enforcement proceeding.

[10] *Switchmen's Union* v. *National Mediation Board*, 320 U.S. 297, 301 (1943); *General Committee, B. L. E.* v. *Missouri K-T-R. Co.*, 320 U.S. 323, 336-337 (1943). *General Committee, B. L. E.* v. *Southern Pac. Co.*, 320 U.S. 338, 343 (1943).

tion of rights under the Railway Labor Act; that this Court has expressly declined to declare Board certifications immune from review in enforcement proceedings, *Switchmen's Union* v. *National Mediation Board,* 320 U.S. at 307; that this Court has affirmed lower courts specifically declaring National Mediation Board certifications invalid and refusing to enforce them, *Virginian Ry. Co.* v. *System Federation,* 300 U.S. at 559-562, *affirming System Federation* v. *Virginian Ry. Co.,* 11 F. Supp. 621, 625-626 (E.D. Va. 1935); that this Court has refused to deprive a district court of its discretion and to make mandatory the issuance of an injunction on the basis of administrative findings even where the statute has directed that where a violation exists an "injunction . . . *shall* be granted," *Hecht Co.* v. *Bowles,* 321 U.S. 321, 327 (1944) (emphasis added); and that nothing in the Railway Labor Act—or any statute—has vitiated the validity of the principles that "the supremacy of law demands that there shall be opportunity to have *some* court decide whether an erroneous rule of law was applied; and whether the proceeding in which facts were adjudicated was conducted regularly," *St. Joseph Stock Yards Co.* v. *United States,* 298 U.S. 38, 84 (1936) (Brandeis, J. concurring) (emphasis added) and that *"the core of the judicial function where enforcement is in question is the determination of legality."* L. Jaffe, *Judicial Control of Administrative Action* 262 (1965) (emphasis in original).

CONCLUSION

For the foregoing reasons, and for those set forth in our petition, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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